

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-8701

File: 20-218325 Reg: 06063200

7-ELEVEN, INC., and DANILO RIVERA MANALASTAS, dba 7-Eleven 2133-29390
23342 Valencia Boulevard, Santa Clarita, CA 91335,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: November 6, 2008
Los Angeles, CA

ISSUED MARCH 18, 2009

7-Eleven, Inc., and Danilo Rivera Manalastas, doing business as 7-Eleven 2133-29390 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days, all stayed for a one-year probationary period, for their clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Danilo Rivera Manalastas, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Lori W. Brogin, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

¹The decision of the Department, dated April 19, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 11, 1988. The Department filed an accusation² against appellants charging that, on October 27, 2006, appellants' clerk, Peter Masih (the clerk), sold an alcoholic beverage to 17-year-old Stephanie Nemr. Nemr was working as a minor decoy for the Department at the time.

At the administrative hearing held on December 14, 2006, documentary evidence was received and testimony concerning the sale was presented by Nemr (the decoy) and by Department investigators Victoria Wood and Gail Clark. Department District Administrator Kathleen Barnes was called as a witness by the licensees and testified about factors she might consider when making a penalty recommendation.

The Department's decision determined that the violation charged was proved and no defense was established. Appellants then filed an appeal contending: (1) The Department engaged in improper ex parte communications; (2) the Department did not have effective screening procedures in place to prevent any of its attorneys from acting as both prosecutor and advisor to the decision maker or to prevent ex parte communication with the decision maker; (3) the face-to-face identification did not comply with rule 141(b)(5)³; and (4) the penalty was excessive. Issues 1 and 2 will be discussed together. Appellants also ask the Board to withhold its decision until the California Supreme Court resolves *Morongo Band of Mission Indians v. State Water*

²The Appeals Board has no actual knowledge of the charge in the accusation or the license history. A copy of the accusation was not included in the certified record or in the hearing exhibits. Information about the accusation and licensing has been taken from the Department's decision. No comment or objection was made by the licensees with regard to the absence of this information from the record.

³References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

Resources Control Bd (rev. granted Oct. 24, 2007, S155589) and augment the record with various documents, including any Report of Hearing and General Order 2007-09.

DISCUSSION

I and II

Appellants contend the Department violated the Administrative Procedure Act (Gov. Code, §§ 11340-11529) and due process by engaging in ex parte communication with the Department's decision maker, and by its failure to maintain effective screening procedures within the legal staff to prohibit its prosecutors from engaging in ex parte communications with the decision maker or the advisors to the decision maker.

The Department requests that this case be remanded for consideration of these questions in accordance with *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585]. Appellants have not objected to this request, and the matter will be remanded for further proceedings. Under the circumstances, there is no need to delay our decision or to augment the record.

III

Appellants contend that the identification of the clerk by the decoy did not comply with the requirements of rule 141(b)(5). The clerk had difficulty with the English language, appellants assert, and there is no evidence that he understood he was being identified. However, the clerk did not testify, so we cannot know what he understood or did not understand. There is no evidence whether the clerk's difficulty was with understanding English or speaking it.

The administrative law judge (ALJ) responded to this argument in Conclusions of Law & Determination of Issues 5, in the last two paragraphs:

However, under case law it is unnecessary that the clerk actually be aware that the identification is taking place. As the Board said in *CEC Entertainment Inc.* (2005), AB-8401, quoting Greer (2000), AB-7403, "The only acknowledgment required is achieved by the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller." It does not require a direct "face off" or any overt acknowledgment to accomplish these purposes.

In the instant case involving clerk Masih, there is no evidence of misidentification and the photographs of the clerk and minor taken together after the face-to-face identification (in evidence), confirm the accuracy of the identification. The clerk reasonably should have known based on all the evidence in the record that he was being identified as the seller. No violation of Rule 141(b)(5) was established.

The ALJ found that the face-to-face identification complied with rule 141(b)(5).

We examine his finding only to see if there is substantial evidence, in light of the whole record, to support it. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) We do not independently evaluate the evidence. The testimony of the Department's witnesses and the exhibits indicate that substantial evidence existed for that finding.

Rule 141(b)(5) is an affirmative defense. As such, it must be proved by its proponent, in this case, appellants. They did not do so, and their contention is rejected.

III

Appellants contend the penalty, a 15-day suspension, all stayed, is "rather excessive." They base this on the District Administrator's testimony that she would have recommended a suspension of 10 days, all stayed, under the circumstances of a hypothetical situation posited by defense counsel in which a first sale-to-minor violation occurred at a premises licensed for more than five years.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable.

The penalty imposed was a considerable reduction from the Department's recommendation of a 25-day suspension. That it was not reduced as much as appellants would have liked does not make it excessive. And what the District Administrator might have recommended under some hypothetical circumstances, or even what she actually recommended, is not relevant in determining whether the penalty actually imposed was reasonable. The penalty imposed was clearly reasonable, and the Department did not abuse its discretion.

ORDER

The decision of the Department is affirmed as to all issues raised other than those regarding allegations of ex parte communication, and the matter is remanded to the Department for further proceedings.⁴

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.